No. 85-1708

Supreme Court, U.S.
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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
*Appellants,*

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
*Appellees.*

**On Appeal from the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE APPELLANTS

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## QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

## PARTIES

The appellants are the State of California; Riverside County, California; and Ben Clark, Sheriff of Riverside County.

The appellees are the Cabazon Band of Mission Indians and the Morongo Band of Mission Indians.

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**On Appeal from the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE APPELLANTS

### OPINIONS BELOW

The U. S. Court of Appeals filed an original opinion reported at 783 F.2d 900, and on its own motion filed an amended opinion not yet officially reported. The amended opinion is reprinted in the Appendix attached to the Jurisdictional Statement ("JS App.") 1-11.

The order and judgment of the district court are reprinted at JS App. 12-15 and 16-18, respectively. The district court did not issue a written opinion, findings of fact, or conclusions of law.

### JURISDICTION

These actions for declaratory and injunctive relief challenge the validity of State and local gambling laws as applied on Indian reservations. The federal courts have jurisdiction under 28 U.S.C. § 1331.

The final decision of the U. S. Court of Appeals was filed and entered on April 8, 1986. JS App. 1. No petition for rehearing was filed. The notice of appeal was filed in the U.S. Court of Appeals on April 14, 1986. JS App. 21-22.

This appeal is filed under 28 U.S.C. § 1254(2), which authorizes appeals from federal appellate decisions striking down state laws as "invalid" under federal law. California's gambling laws are meant to apply on Indian reservations as elsewhere, and the Ninth Circuit invalidated California laws as applied on Indian reservations. Indeed, the plaintiff Tribes' action directly seeks a declaratory judgment overturning State and local gambling laws as so applied. JA 34-35, 43-45. The Ninth Circuit clearly intended to invalidate California laws as applied; the court described the nature of California's gambling laws, JS App. 2; made repeated references to California's "bingo statute," "bingo law," and "gambling laws," *id.* at 2, 3, 5, 7, 8; and concluded that California could not apply its "gambling laws" on Indian reservations and enjoined California from so applying its "gambling laws." *Id.* at 11. Thus, the Ninth Circuit clearly struck down California laws as applied.

This Court has held that appeals are proper under 28 U.S.C. § 1254(2) where a state statute is struck down "as applied to the facts of the case," even though the statute is unaffected as applied in other contexts. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, ____ U.S. ____, 54 U.S.L.W. 4860, 4862 (June 27, 1986); *Dutton v. Evans*, 400 U.S. 74, 76 n. 6 (1970); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). Thus, an appeal is proper here.

This Court has also held that appeals are proper under 28 U.S.C. § 1257 when taken from state court decisions *upholding* state laws as applied on Indian reservations. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In light of the "history of . . . close relationship between" sections 1254(2) and 1257, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 n. 9 (1984), an appeal

should be equally proper when taken from federal appellate decisions *invalidating* state laws as applied on Indian reservations. The question whether the state law is "valid" is the focal inquiry in both sections, and therefore the propriety of the appeal should not depend on which section is invoked.

This Court's decisions in *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), and *Silkwood v. Kerr-McGee Corp., supra*, 464 U.S. 238, do not suggest an opposite result. In neither case did the federal appellate court invalidate a state statute, even as applied. In *Perry*, the appellate court invalidated a collective bargaining agreement undertaken pursuant to a state statute, but did not invalidate the statute itself. 460 U.S. at 42-44. In *Silkwood*, the appellate court invalidated a lower federal decision granting a punitive damages award under authority of a state statute, but did not invalidate the statute itself. 464 U.S. at 246-248. As the Court noted in *Silkwood*, "while the award itself was struck down, the statute authorizing such awards was left untouched." *Id.* at 247. Indeed, the Court in *Silkwood* noted that the appellate court had not mentioned the state statute in its decision. *Id.*

In the instant case, however, the Ninth Circuit directly struck down State and local gambling laws as applied on Indian reservations, rather than invalidating actions undertaken in reliance on the State and local laws. As noted above, the court amply cited and discussed the State and local laws in its decision. JS App. 2, 3, 5, 7, 8. Indeed, unlike *Perry* and *Silkwood*, this action directly seeks a declaration invalidating State and local laws as applied here. Therefore, *Perry* and *Silkwood* are not controlling.

If, however, this Court determines that an appeal is improper here, it should review the matter by writ of certiorari. 28 U.S.C. § 2103; see *Palmore v. United States*, 411 U.S. 389, 396 (1973).

## FEDERAL LAWS

This case primarily involves federal common law principles governing state jurisdiction over Indian reservations. The case also involves two federal statutes: Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360, reprinted at JS App.

23-25; and the Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955, reprinted at JS App. 25-26.

## STATEMENT OF THE CASE

### 1. Nature of the Controversy

The Cabazon Band of Mission Indians and the Morongo Band of Mission Indians ("Tribes") occupy separate reservations in Riverside County, California. Cab. Stip. 2-3, Mor. Stip. 1-2 (CR 54; JA 60-61, 79).[1] The Cabazon reservation was authorized by presidential executive orders issued in 1876 and 1891, and the Morongo reservation was authorized by a presidential executive order issued in 1877 and by subsequent presidential proclamations, federal statutes, and deeds. Cab. Stip. 3, Mor. Stip. 2-3 (JA 61, 80). The Cabazon reservation consists of 1,700 acres of land, and the Morongo reservation consists of 32,300 acres. Cab. Stip. 3, Mor. Stip. 2 (JA 61, 79). The Cabazon Tribe has 25 enrolled members and the Morongo Tribe has 730 enrolled members. Cab. Stip. 3, Mor. Stip. 3 (JA 61, 80).

The Tribes conduct high stakes bingo games for profit on their reservations. Cab. Stip. 5-7, Mor. Stip. 4-5 (JA 63-65, 81-83). The games are conducted in large bingo parlors. The Cabazon parlor can accommodate 500 players, and the Morongo parlor can accommodate 1,400 players. Cab. Stip. 7, Mor. Stip. 6 (JA 65, 83). The games are operated by non-Indian operators pursuant to management agreements with the Tribes, and the non-Indian operators receive a substantial percentage of the profits. Cab. Stip. 5-7, Mor. Stip. 4-5 (JA 63-65, 81-83). The games are authorized by ordinances adopted by the Tribes. Cab. Stip. 5, Mor. Stip. 4 (JA 64, 81). The Cabazon ordinance has not been submitted to or approved by the Secretary of the Interior, although the Secretary has approved the Morongo ordinance. *Id.*

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[1] "CR" refers to the Clerk's Record, and specifically to the item number in the district court docket entries; "JA" refers to the Joint Appendix; "Cab. Stip." refers to the stipulation of the facts between the Cabazon Band and the defendants; and "Mor. Stip." refers to the stipulation of facts between the Morongo Band and the defendants.

Neither the Secretary nor any other federal officer regulates, supervises, or monitors the tribal games.

The tribal bingo games are patronized by hundreds of players each night. Hopper Dec. 6 (CR 58, Exh. 17; JA 178). Most of the players are non-Indians. *Id.* As the Ninth Circuit observed, the games "are played predominantly by non-Indian participants." JS App. 2. The bingo parlors are situated adjacent to a major highway linking Los Angeles with Palm Springs, and the bingo parlors are clearly visible from the highway. Cab. Stip. 4, Mor. Stip. 4 (JA 65, 83). The games are advertised on billboards situated along the highway, and also in newspapers and brochures distributed in surrounding non-Indian communities. *Id.*

The tribal bingo games violate California's gambling laws. Under California law, lotteries are prohibited except where specifically authorized by law. Cal. Pen. Code § 320. An exception from the lottery ban is provided for bingo conducted by charitable organizations. *Id.* at § 326.5. Charitable bingo is subject to numerous statutory safeguards to prevent organized criminal infiltration. In particular, charitable bingo must be conducted by members of the charitable organization itself; profits must be maintained in special fund accounts; and jackpots cannot exceed $250. *Id.;* see note 14, *infra.* As the Ninth Circuit noted, the tribal games violate all these provisions. JS App. 2. Indeed, the tribal jackpots greatly exceed $250. The Cabazon jackpots include cars, pickups, boats, and cash awards of thousands of dollars.[2] The Morongo Tribe advertises that its games provide the "World's Largest Jackpots!", Salter Dec., Exh. A (CR 88), and that it paid

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[2] A State investigator, randomly visiting the Cabazon bingo parlor one night in 1984, observed that the prizes included: a 1984 Dodge pickup and All Terrain vehicle; a Sylvan Bass boat valued at $6,771; a do-it-yourself jackpot of $2,250; a Bonanza Bingo jackpot of $6,300; and regular jackpots of $150, with a super jackpot of $750 for four games. Hopper Dec. 3-5 (CR 58, Exh. 17; JA 175-177).

The Morongo bingo games have advertised: "High Stakes; Over $20,000 nightly; more than $5,000,000 in 1983; $15,000.00 Jackpot Must Go Every Saturday Night in January; 1984 Auto-Every Sunday Must go; Matinee Every Saturday During January; Mystery Door Prize Every Night in January." Salter Dec., Exh. B (CR 88).

over $5 million in jackpots in 1983. See note 2, *supra*. Another tribe in California, the Barona tribe, advertises: "$1,000,000; Million Dollar Bingo Blackout." Salter Dec., Exh. C (CR 88).

The Cabazon Tribe also conducts three card parlor games on its reservation: draw poker, lowball draw poker, and panguingue. Cab. Stip. 4-5, 7 (JA 62-63). The card parlor games violate Riverside County Ordinance No. 331, which prohibits these card games in all areas within the County's jurisdiction. *Id.*

The tribal activity here is part of a growing movement by Indian tribes nationally to conduct high stakes gambling operations—mostly featuring bingo—designed to attract non-Indian players. At least 100 such operations were in effect in 19 states last year—including 26 in California alone—and the present figure is probably higher. JS App. 27-30. Many such operations generate gross revenues of up to $1 million monthly. See note 16, *infra*. This test case raises the question whether such tribal operations are lawful where they violate state and local gambling laws.

**2. Proceedings Below**

The Tribes brought consolidated actions for injunctive and declaratory relief and for damages against Riverside County, alleging that State and County laws prohibiting commercial gambling cannot be applied to the tribal bingo and card parlor games here. CR 36, 65 (JA 21, 36). The State of California intervened. CR 43, 68 (JA 51, 54). The parties filed cross-motions for summary judgment on the jurisdictional question whether State and County gambling laws apply on Indian reservations. CR 57, 60, 62. The district court granted the Tribes' motion and denied the State and County's motion, ruling that State and County gambling laws cannot be so applied. CR 102, 103; JS App. 12-20. The court issued final judgment on the jurisdictional issue under Rule 54(b) of the Federal Rules of Civil Procedure; issued a permanent injunction restraining the State and County from applying their gambling laws on the reservations; and

retained jurisdiction to consider the damages issues. *Id.*[3] The State and County appealed.

On appeal, the Ninth Circuit affirmed the lower decision, ruling that State and County gambling laws cannot be applied on Indian reservations. JS App. 1-11. The court reasoned that such application is not authorized by the "federal common law," as applied by this Court in *Rice v. Rehner*, 463 U.S. 713 (1983). According to the court, Indian tribes have an "inherent sovereign" right to conduct gambling operations patronized by non-Indians, and the tribal interest in raising revenue outweighs the State and County interest in preventing organized criminal intrusion. JS App. 10-11. The court also ruled that Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, and the Organized Crime Control Act, 18 U.S.C. § 1955, do not authorize the application of State and County gambling laws on Indian reservations. JS App. 3-6. The court's decision applied both to the State bingo statutes and the County card parlor ordinance. JS App. 2 n. 1.

The State and County appealed the Ninth Circuit decision to this Court under 28 U.S.C. § 1254(2). This Court granted review on June 9, 1986, and deferred consideration of the jurisdictional question until the hearing on the merits.

## SUMMARY OF ARGUMENT

### I

Since Congress has never fully determined whether state laws apply on Indian reservations, this Court has adopted federal common law in determining their applicability. Under the federal common law, the applicability of state laws on Indian reservations depends on the balance of state, federal, and tribal interests. In *Rice v. Rehner*, 463 U.S. 713 (1983), and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), this Court held that, under the balancing test, states have the right to regulate sales by Indian tribes to non-Indians on a

[3] On stipulation, the district court subsequently dismissed the damages claim filed by the Morongo Tribe.

reservation, particularly where the tribes attempt to "market an exemption" from state laws to non-Indians.

The balancing test supports the application of State and local gambling laws here. The Tribes are selling a product—high stakes bingo—to non-Indians. The games are profitable only because they provide a product that non-Indians cannot lawfully obtain elsewhere. Thus, the Tribes are taking commercial advantage of State gambling restrictions against non-Indians. They are "marketing an exemption" from State gambling laws to non-Indians. Additionally, Indian tribes have not traditionally conducted gambling operations that solicit and depend on non-Indian patronage. For these reasons, the tribal interest is entitled to little deference here.

The State has a vital interest in prohibiting the tribal bingo games here. First, State gambling policy is frustrated if Indian tribes can market an exemption from State gambling laws to non-Indians. Second, the tribal bingo games create a serious risk of organized criminal infiltration. The risk arises because the games feature high stakes and are not regulated. The Tribes themselves lack the law enforcement capability to ensure that the games are honestly run, or to handle the law enforcement problems arising when hundreds of non-Indians enter the reservations to play the games. The State interest is thus entitled to considerable deference.

The federal interest is, at most, neutral in this case. Congress has not authorized Indian tribes to conduct gambling operations in violation of state law. No federal agency or official regulates, supervises, or monitors the tribal games. Therefore, no federal regulatory scheme or policy supports the tribal games. Indeed, the Organized Crime Control Act, which authorizes state and local gambling laws to be applied on federal lands, establishes a federal policy in support of the application of State and local laws here.

Therefore, the common law balancing test supports the application of State and County gambling laws in this case.

## II

Public Law 280, which authorizes California and certain other states to exercise civil and criminal jurisdiction over Indian reservations, authorizes California to apply its gambling laws on Indian reservations. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court stated in dictum that Public Law 280 does not authorize states to apply their "civil regulatory" laws on Indian reservations. In *Rice v. Rehner, supra*, 463 U.S. 713, however, this Court held that, under the common law balancing test, California has the right to regulate liquor sales on Indian reservations. Thus, *Rice* and *Bryan* create the anomaly that, although Public Law 280 was intended to *broaden* state jurisdiction over Indian reservations, Public Law 280 actually confers *less* regulatory jurisdiction than states already have under the federal common law. This Court should resolve the anomaly by rejecting the *Bryan* dictum that state "civil regulatory" laws do not apply, particularly because the dictum is inconsistent with specific provisions in Public Law 280 and with its legislative history. Moreover, even assuming the validity of the *Bryan* dictum, California's gambling laws are "criminal prohibitory" and hence are included under Public Law 280 in any event.

## III

The Organized Crime Control Act authorizes state and local gambling laws to be applied on federal lands, including Indian reservations. Thus, Congress, rather than preempting state laws as applied here, has affirmatively authorized their application. The Organized Crime Control Act not only directly authorizes state laws to be applied here, but also expresses a federal policy supporting that result, as federal policy is relevant under the common law balancing test.

## ARGUMENT

### I

### THE BALANCE OF STATE, FEDERAL, AND TRIBAL INTERESTS, AS RELEVANT UNDER THE FEDERAL COMMON LAW, SUPPORTS THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS.

#### A. The Balancing Test

Since Congress has never fully determined whether state laws apply on Indian reservations, this Court has developed federal common law governing the matter. Initially, this Court held that Indian reservations are analogous to foreign nations whose boundaries are impenetrable by state law. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Today, a more flexible view prevails. Under the modern view, state laws are applicable on Indian reservations unless they are preempted by federal law or infringe on tribal self-government. See *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 167-173 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 74-75 (1962). Increasingly, the jurisdictional focus is on federal preemption rather than tribal sovereignty. "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and towards reliance on federal preemption." *McClanahan*, 411 U.S. at 172. Tribal sovereignty is relevant "not because it provides a definitive resolution of the issues," but "because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172; see also *Rice*, 463 U.S. at 718.[4]

The preemption analysis, as applied in Indian law cases, requires a balancing of state, federal, and tribal interests. See *Rice*,

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[4] No treaties exist between California Indian tribes and the federal government. *Indians of California v. United States*, 98 Ct.Cl. 583, 585 (1943). Therefore, the preemption issue as relevant here must focus on federal statutes, not federal treaties.

463 U.S. at 720. As this Court stated in *White Mountain Apache Tribe*, the question requires a "particularized inquiry" into "the nature of state, federal, and tribal interests at stake." 448 U.S. at 145. The balancing test, or "particularized inquiry" test, is a form of federal common law, for it is a judicial doctrine rather than a constitutional or statutory one; therefore, Congress can "pre-empt" or displace the balancing test by enacting legislation defining state jurisdiction over Indian reservations. Cf. *Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981) (Clean Water Act displaces federal common law of nuisance as applied). Congress has not preempted or displaced state gambling laws as applied on Indian reservations, as the Ninth Circuit properly held and as we explain below. JS App. 6, & n. 6; see pages 30-31, 33-34, *infra*.[5] Therefore, the common law balancing test applies here.

Prior to the Ninth Circuit decision here, only two appellate courts have applied the balancing test in determining whether state gambling laws apply on Indian reservations, and both concluded that the balancing test supports their application. See *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 923 (1983); *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985).[6] In *Penobscot*, the Maine Supreme Judicial Court held that, under the balancing test, Maine can prohibit Indian commercial "beano"—a form of bingo— played primarily by non-Indians. 461 A.2d at 482-487.

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[5] Specifically, the Ninth Circuit held, as we explain more fully later, that Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, which authorizes California and certain other states to exercise limited civil and criminal jurisdiction over Indian reservations, does not preempt state or local laws otherwise applicable on Indian reservations. JS App. 6-7, & n. 6.

[6] As explained later, the Fifth Circuit and the Ninth Circuit in an earlier decision held that Public Law 280 and the Organized Crime Control Act do not authorize state gambling laws to be applied on Indian reservations. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); see pages 39-40, *infra*. Both decisions interpreted and applied federal statutes, and did not apply the common law balancing test.

The Court reasoned that the State has a "legitimate governmental interest" in prohibiting the games; that the Tribe would have "nothing to 'sell' " if the State did not prohibit the games; and that the Tribe was attempting to "market an exemption" from State gambling laws to non-Indians. *Id.* at 485. The Court also held that commercial beano has played no part in the Tribe's "historical culture and development," is "not uniquely Indian in character," and is "not a traditional Indian practice." *Id.* at 490.[7]

In *Seneca-Cayuga*, the Oklahoma Supreme Court held that Oklahoma can prohibit Indian commercial bingo games patronized by non-Indians.[8] The Court reasoned that "bingo is [not] a traditional tribal activity," that its "main (and perhaps only) purpose" is "to generate funds for the Tribes," and that the Tribes' "legitimate interest" in "economic development" does not outweigh the State's "legitimate interest in preventing infiltration of organized crime. . . ." 711 P.2d at 90, 91. The Court noted that this Court "has extended state laws to tribal commercial activities affecting substantial numbers of non-Indians, where such non-Indian citizens evade state laws by benefiting from an exclusively Indian exemption." *Id.* at 90-91.

Applying the balancing test here, the Ninth Circuit reached the opposite result, holding that State gambling laws infringe on tribal sovereignty and are therefore inapplicable on Indian reservations.

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[7] This Court dismissed the Tribe's appeal in *Penobscot* "for want of a substantial federal question." 464 U.S. 923 (1983). Since the dismissal of an appeal on such grounds is a disposition on the merits, *Hicks v. Miranda*, 422 U.S. 332, 345 (1975), this Court in effect affirmed the Maine Court decision in *Penobscot*.

In a second, alternative holding, the Maine Court in *Penobscot* held that a federal statute, the Maine Indian Claims Settlement Act, also supports the conclusion that Maine can prohibit the Indian commercial bingo games. 461 A.2d at 487-490.

[8] The Court remanded for determination of whether the tribal games were patronized by Indians or non-Indians. 711 P.2d at 92, & n. 76. This factual issue is not presented here because the Ninth Circuit properly held that the tribal games "are played predominantly by non-Indian participants." JS App. 2.

JS App. 6-11. Significantly, the court held that State laws are *not* preempted by federal law. *Id.* at 6-7, & n. 6. Instead, the court rested its decision on tribal sovereignty grounds. *Id.* at 7-11. According to the court, the Tribes have a "sovereign" interest in raising revenue—regardless of the form of "activity" by which the revenue is raised—and the tribal revenue-raising interest outweighs the State's "legitimate" interest in preventing organized criminal infiltration. *Id.* at 7, 8, 10-11. Since the court held that federal laws do not preempt State laws, this case is distinguished from those where this Court has invoked federal preemption in striking down state laws as applied on Indian reservations. See, *e.g., White Mountain Apache Tribe,* 448 U.S. 136; *McClanahan,* 411 U.S. 164; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). In effect, the Ninth Circuit invoked tribal sovereignty as an absolute bar to State jurisdiction, rather than as a "backdrop" in analyzing the preemption issue.

As we now explain, the balance of State, federal, and tribal interests supports the application of State and local gambling laws here, and therefore the State court decisions in *Penobscot* and *Seneca-Cayuga,* not the Ninth Circuit decision below, properly follow and apply the principles of modern federal Indian law.

**B. The Tribal Interest**

**1. "Marketing an Exemption"**

Turning first to the tribal interest, this Court has held that the tribal interest is weakest, and the state interest strongest, where the tribal activity affects non-Indians on the reservation. See *Rice,* 463 U.S. at 721, & n. 7; *Washington v. Confederated Tribes of the Colville Reservation ("Colville"),* 447 U.S. 134, 151 (1980). In *Rice,* this Court held that California has the right to regulate liquor sales by licensed Indian traders to non-Indian purchasers on an Indian reservation. The Court reasoned that "any interest in tribal sovereignty" is implicated only where the State regulates sales "to other members of" the tribe, not where the State regulates sales to non-Indians. 463 U.S. at 721. Referring by analogy to its tax decisions, the Court stated that a state may tax sales by Indians to non-Indians on a reservation even though the tax " 'seriously disadvantages or eliminates the Indian retailer's

business with non-Indians, . . . [because] the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.' " 463 U.S. at 721 n. 7, quoting from *Colville,* 447 U.S. 151, & n. 27. The Court concluded that State regulation of sales to non-Indians "simply 'does not contravene the principle of tribal self-government.' " 463 U.S. at 721 n. 7, quoting from *Colville,* 447 U.S. at 161. See also *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 475-476 (1976).

In *Colville,* this Court held that the tribal interest is particularly weak where the tribe not only sells products to non-Indians, but also attempts to "market an exemption" from state laws to non-Indians. 447 U.S. at 155. There, the Court upheld the State of Washington's right to tax on-reservation cigarette sales by Indian smokeshops to non-Indian purchasers. The Court noted that "most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices" offered by the smokeshops, and that the "market existed in the first place only because of a claimed exemption from these very [state] taxes." 447 U.S. at 154, 157. The tribe's "primary argument," the Court noted, was an "economic" one, and imposition of the state tax will mean that the tribes will "no longer enjoy any competitive advantage" over off-reservation businesses. *Id.* at 154. The Court concluded:

> "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. [Citations omitted.] *What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation* . . . . We do not believe that principles of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorize Indian tribes thus to *market an exemption* from state taxation to persons who would normally do their business elsewhere." *Id.* at 155 (emphasis added.)

The factors applied in *Rice* and *Colville* strongly support the application of State and local gambling laws here. The tribal bingo operations affect non-Indians, for the games attract, and are intended to attract, non-Indian players. As the Ninth Circuit

observed, the games "are played predominantly by non-Indian participants." JS App. 2. Since Indian tribes have "no vested right" to sell products to non-Indians, see *Rice*, 463 U.S. at 721 n. 7, tribal sovereignty is not implicated here.

More importantly, the Tribes are attempting to "market an exemption" from State gambling laws to non-Indians. The Tribes are marketing a product—high stakes bingo—that is illegal under State law. Indeed, the product has value only *because* it is illegal under State law. The tribal games are patronized by non-Indians who cannot lawfully play high stakes bingo elsewhere in California. The tribal games would not be successful if the State legitimized high stakes bingo, thus allowing non-Indian businesses to compete with tribal businesses. Certainly the hundreds of non-Indians who play the games each night would patronize other, more local establishments if they were available. The Cabazon games, for example, would not be profitable if played only by members of the Tribe, since the Tribe has only 25 members, Cab. Stip. 3 (JA 61); the games are profitable because they attract hundreds of non-Indians nightly who cannot lawfully play high stakes bingo elsewhere.

Thus, California has created the "market" by prohibiting high stakes bingo, and the Tribes are exploiting the market by openly selling the illegal product to non-Indians. The Tribes are taking commercial advantage of California's gambling prohibitions by marketing the very product that is prohibited. They are, in effect, selling exemptions from California's gambling laws to non-Indians. The situation is the same as if the Tribes were openly selling contraband, as defined by state law, to non-Indians. The success of the tribal venture depends less on the tribal effort than on State laws prohibiting such ventures.

The tribal games frustrate California's legitimate interest in preventing its non-Indian citizens from playing high stakes bingo, thus making it more difficult for California to protect this interest even in off-reservation areas. If non-Indians can play high stakes bingo on Indian reservations, there is little reason for California to prohibit such games off the reservation. That is, if California's gambling prohibitions can be so easily circumvented, there is little reason for the prohibitions to be maintained. Legitimization of

tribal commercial endeavors that take advantage of state restrictions against non-Indians—whether the restrictions apply to bingo or other commercial activity—makes it logically difficult for the state to maintain the restrictions, and places improper pressure on the state to remove the restrictions altogether. In short, the tribal games, by exploiting California's policy against high stakes gambling, render the policy largely pointless. The effect of the tribal activity here is thus not confined to the reservation, but rather "spills over" into off-reservation areas by undermining the State's general policy against high stakes gambling. Cf. *Rice*, 463 U.S. at 724.

The Ninth Circuit held that the case involves "only Indians" because California regulates "Indian" operators rather than non-Indian patrons. JS App. 8. To the contrary, the case involves non-Indians because the tribal games solicit and depend on non-Indian patronage. The Ninth Circuit improperly focused on the incident of state regulation rather than its purpose and effect, contrary to the "practical effect" analysis followed by this Court in other contexts. See, *e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (constitutional validity of state taxes as applied to interstate commerce depends on their "practical effect"). In fact, the State regulates operators rather than patrons because the operators control the games, and hence are most likely to be subject to organized crime influence. Further, it would be difficult to regulate patrons because it is not known whether a person departing an Indian reservation has played the games or not. In *Rice*, this Court upheld a State regulation whose incident applied to Indian sellers rather than non-Indian buyers, and did not suggest that the case involved "only Indians" because the immediate incident fell on Indian sellers. In any event, the immediate incident of the State regulation here falls on non-Indians because the games are operated by non-Indian professional gamblers. JS App. 2. For these reasons, the Ninth Circuit's distinction between operators and patrons is misplaced.[9]

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[9] The Ninth Circuit distinguished *Rice* on the ground that *Rice* involved a federal liquor statute—18 U.S.C. § 1161—not relevant here. JS App. 5 n. 4. In *Rice*, however, this Court primarily applied the common law balancing test and concluded that state interests outweigh

### 2. The Tribal "Tradition"

In *Rice*, this Court held that the tribal "tradition" is highly relevant in evaluating the tribal interest. 463 U.S. at 719-720. According to *Rice*, if a sovereign tribal tradition exists, state laws generally cannot be applied on Indian reservations unless Con-

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tribal interests because of the absence of a sovereign tribal "tradition." 463 U.S. at 720-725. After applying the balancing test, the Court ruled that the federal statute, 18 U.S.C. § 1161, did not preempt state laws and indeed supported their application. *Id.* at 725-735. Thus, the analytical mode was that the common law balancing test supported the application of state law, and that the federal statute did not change the result and indeed supported it. *Rice*, insofar as it applied the balancing test, is thus not distinguishable here. Moreover, as explained later, the Organized Crime Control Act authorizes the application of state gambling laws on Indian reservations, and this federal enactment expresses federal gambling policy here as clearly as 18 U.S.C. § 1161 expressed federal liquor policy in *Rice*. See pages 31, 41-42, *infra*.

The Ninth Circuit distinguished *Colville* on the ground that the Tribes here, unlike those in *Colville*, are providing "value" to non-Indian patrons. JS App. 13. To be sure, *Colville* did observe that the tribal interest is stronger "when the [tribal] revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 447 U.S. at 156-157. In this case, however, the tribal product—high stakes bingo—has "value" only because it is prohibited by State law. Thus, the tribal product has "value" only in the sense that contraband has "value," and such "value" is not judicially cognizable. In any event, the "value" owes less to tribal initiative than to State policy, and thus cannot weigh in favor of the tribal interest here.

Finally, *Colville*, we believe, stands for the broader proposition that Indian tribes cannot "market an exemption" from state laws to non-Indians, whether or not "value" is provided. As one commentator has stated:

> "The *Colville* Court . . . observed that reservation businesses are not entitled to legally enforced commercial advantages and should be treated just as non-Indian business would be. [Citation omitted.] This argument suggests that the Court may be willing to limit the immunity given to tribes when they act commercially." Note, "In Defense of Tribal Sovereign Immunity," 95 HARV. L. REV. 1058, 1068 (1982) (emphasis added).

gress expressly authorizes their application. *Id.* If, however, a sovereign tradition does *not* exist, or if the balance of state, federal, and tribal interests otherwise requires, the "backdrop" of tribal sovereignty is accorded "less weight." *Id.* Although ambiguities in federal Indian law are generally construed in favor of Indian tribes, see, *e.g., McClanahan,* 411 U.S. at 170-171, this canon of construction does not apply in the absence of a sovereign tribal "tradition." *Rice,* 436 U.S. at 731.

The tribal activity here is well outside the tribal "tradition." Indian tribes have not traditionally conducted high stakes gambling operations that solicit and depend on non-Indian patronage, particularly where the operations are successful because they violate state law. The economic base of Indian tribes has never depended on large-scale gambling operations, conducted in buildings erected specially for gambling purposes. The kind of activity involved here is not indigenous to Indian custom or culture, nor a traditional Indian practice.[10] The tribal interest here is purely economic—the games have no purpose other than the production

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[10] In support of their motion for summary judgment in the district court, the State and County submitted a declaration by Professor William J. Wallace, professor emeritus of anthropology at California State University, who has done extensive anthropological work on the cultural life of California Indian tribes. Wallace, although acknowledging that Indians often aboriginally gambled for ceremonial, religious, and recreational puposes, concluded:

> "The Indians of California have often gambled intratribally and, on festive occasions, with other tribes. However, the Indians of California have not traditionally engaged in commercial gambling, or operated commercial gambling establishments. Also, the Indians of California have not, to any significant degree, traditionally engaged in gambling with non-Indians on either a commercial or non-commercial basis." Wallace Dec. 2 (CR 58, Exh. 16; JA 153).

Wallace further concluded:

> "A new development has been the establishment of commercial bingo parlors at several reservations. These tribally-run enterprises aim at attracting players from surrounding towns and cities by offering large cash prices . . . Undertakings of this sort find no precedent in native California Indian life and culture. The game itself (a lottery), the building of special gaming halls, tribally

of revenue—and the Tribes have no particular interest in the activity itself.

The Ninth Circuit below held that the tradition question turns not on whether the Tribes "have historically engaged in a particular activity," but on whether they are "engaged in a traditional governmental function." JS App. 11. According to the court, the Tribes here are "engaged in the traditional governmental function of raising revenue," *id.*, and this tribal interest "outweighs" the

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organized gambling and dependence on its revenue as an economic base, attempts to lure outsiders, particularly non-Indians, to play,—all these things fall well outside the boundaries of traditional native gambling." *Id.*, Report attached thereto, at 20-21 (JA 171).

The Tribes submitted a declaration by Professor Lowell Bean, another respected professor of anthropology, who differed with certain minor parts of Wallace's analysis. Bean Dec. 2-3, & Report attached thereto (CR 67; JA 206). Professor Bean, relying on the fact that Indians often gambled during religious and ceremonial festivals, concluded that the tribal bingo games are an "adaptation" of Indian gambling habits and customs. *Id.* at 2 (JA 209). Whether the bingo games are an "adaptation" of Indian gambling customs is a legal characterization rather than an anthropological fact, and the State and County disagree with Bean's legal characterization. More importantly, Bean does not disagree with Wallace's main conclusion, to the effect that the Indians of California have not traditionally conducted tribally-sponsored, high stakes commercial gambling operations that solicit and depend on non-Indian patronage. The district court, during oral argument on the motions for summary judgment, rejected the tribal argument that the gambling operations here are a "traditional" form of tribal activity. RT 4:10-22.

Professor A. L. Kroeber, a renowed anthropologist who studied the early culture of California's Indian tribes, observed that many Indians in California engaged in small-scale gambling with other Indians on festive occasions, such as dances or mourning ceremonies. A. Kroeber, *Handbook of the Indians of California*, published as Bulletin 78, Bureau of American Ethnology, at 848 (1925) (CR 58, Exh.1). Some games would require dexterity, such as schinny or lacrosse; others would involve chance, such as hand or stick, or dice. *Id.* at 846. The games, however, were conducted within the tribe, or, on some special occasions, with other tribes. *Id.* No mention is made of bingo or other lotteries being conducted on a commercial basis, particularly involving predominantly non-Indian participants. *Id.*

State's interest in protecting against intrusion of organized crime. *Id.* at 19. In short, the court held that the Tribes' economic interest outweighs the State's regulatory interest.

The Ninth Circuit analysis departs from modern federal Indian law, which focuses on the nature of the tribal activity rather than the tribal revenue-raising interest. In *Rice,* this court measured the tribal tradition in terms of the activity; the question was whether Indian tribes have traditionally regulated liquor sales, not whether they have profited from such sales. 463 U.S. at 720, 722, 725.[11] In *Colville*, this Court rejected the Tribes' "economic argument" that they have a sovereign right to market products more cheaply than non-Indian businesses. 447 U.S. at 154. The Ninth Circuit here, however, upheld the tribal economic argument rejected in *Colville,* and failed to even consider whether commercial gambling is a traditional form of tribal activity. Under the Ninth Circuit view, Indian tribes would have a sovereign right to market any commodity or contraband to non-Indians, no matter how much such marketing is outside that tribal tradition or illicit under state law. This result expands tribal sovereignty beyond its legitimate scope, and is not consistent with the "accommodation" of state, federal, and tribal interests that is the essence of modern federal Indian law. See *Rice,* 463 U.S. at 719, quoting from *Collville*, 447 U.S. at 156.

Indeed, the Ninth Circuit decision is inconsistent with the historic purposes of the reservation system itself. The reservation system was intended to provide Indians with a homeland for preservation of their traditional culture, and to separate them from non-Indians who were migrating westward. See *Matter of Heff,* 197 U.S. 488, 498 (1905); *Hopkins v. United States,* 414 F.2d 464, 467 (9th Cir. 1969). Its purpose was to allow Indians to

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[11] The Court stated that "the 'backdrop' in this case concerns the licensing and distribution of alcoholic beverages," 463 U.S. at 720; that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians," *id.* at 722; and that "the court below erred in thinking that there was some *single* notion of tribal sovereignty that served to direct *any* pre-emption analysis involving Indians." *Id.* at 725 (emphasis in the original.

live together, to create governmental and social organizations, to pursue agriculture, to hunt and fish, and even to commercially exploit the physical resources of the reservation. See, *e.g., Washington v. Washington State Commercial Vessel Ass'n,* 443 U.S. 658 (1979). Its purpose was *not* to convert Indian reservations into gambling havens for non-Indians who wish to circumvent state gambling laws, or to encourage Indians themselves to become a class of professional gamblers. Such, however, is the effect of the Ninth Circuit decision here. The lower decision, by allowing Indian tribes to establish gambling enclaves for the benefit of non-Indians, may well encourage a breakup of tribal culture rather than its preservation.

### C. The State Interest

Under the balancing test, the state interest is highly relevant in determining the applicability of state laws on Indian reservations. *Rice,* 463 U.S. at 719, 724; *White Mountain Apache Tribe,* 448 U.S. at 144. In *White Mountain Apache Tribe,* this Court struck down state taxes as applied to non-Indian logging operations on Indian reservations, reasoning that the state had no "legitimate regulatory interest" other than to "raise revenue" and that the state had performed no services justifying such revenues. 448 U.S. at 150. In *Rice,* on the other hand, this Court upheld California's right to regulate liquor sales on Indian reservations partly because of the impact of such sales on legitimate state interests. 463 U.S. at 724.

California's interests are affected here in two different but related ways. First, as explained above, the tribal bingo games exploit California's gambling restrictions against non-Indians, thus undermining California's general policy against high stakes gambling. Second, as explained below, California gambling policy—which prohibits lotteries except where regulated by strict statewide standards—is intended to prevent organized criminal infiltration in California. The tribal games violate California's regulatory standards and thus create substantial risks of criminal infiltration. For these reasons, California's interests are strongly affected here.

### 1. California Gambling Policy

Under the common law of California, unregulated gambling is contrary to public policy and hence unlawful. *Bryant v. Mead,* 1 Cal. 441 (1851); *Carrier v. Brannan,* 3 Cal. 328 (1853); *Gridley v. Dorn,* 57 Cal. 78, 79 (1880); *Collins v. Lean,* 68 Cal. 284 (1885); *People v. Philbin,* 50 Cal.App.2d Supp. 859 (1942); *Tokar v. Redman,* 138 Cal.App.2d 350, 354 (1956). In the landmark *Bryant* decision, the California Supreme Court held that California common law on gambling follows the English common law as laid down by Blackstone, and thus that gambling is *malum in se.* 1 Cal. at 442. According to the Court, gambling is an "offense . . . mischievous to society," gambling houses are "public nuisances," and gambling wagers are contrary to "sound public policy." *Id.* at 442, 444. In *Carrier,* the California Supreme Court stated that gambling is "vicious and immoral in its nature, and ruinous to the harmony and well-being of society." 3 Cal. at 329. The Court also stated, however, that "the Legislature, finding a thirst to play so universally prevalent throughout the State, and despairing of suppressing it entirely, has attempted to control it within certain bounds by imposing restrictions and burdens upon persons carrying on this kind of business." *Id.* Thus, California common law, from *Bryant* to the present, regards gambling as a general vice subject to controlled legislative exceptions.

The California Constitution, following the common law, originally prohibited all forms of lotteries. Cal. Const., Art. IV, § 27 (1879), *as amended and renumbered,* Art. IV, § 19. The California Legislature, implementing the constitutional prohibition, has enacted a general scheme prohibiting lotteries. Cal. Pen. Code § 319, 320. In 1950, the people of California rejected a proposed constitutional amendment that would have authorized licensed gambling establishments. The ballot argument against the proposed amendment, which apparently persuaded a majority of voters, argued that legalized gambling would encourage the growth of organized crime.[12]

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[12] According to the opposing ballot argument, the amendment "would encourage big-time crime, civic corruption and juvenile delinquency and

In 1976, the people of California adopted a constitutional amendment that, although continuing the general prohibition against lotteries, authorized legislative approval of bingo games "only for charitable purposes." Cal. Const., Art. IV, § 19(c). The ballot argument supporting the amendment declared that charitable bingo, if properly regulated by the State, does not pose the risk of organized criminal growth that underlies the general constitutional ban against gambling.[13]

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make law enforcement tremendously more difficult;" the experience of other states "has shown conclusively that serious crime rackets have mushroomed when professional gambling was sanctioned;" and "big-time gangsterism" would result if the amendment were adopted. See Ballot Argument, Initiative No. 6, Proposed Amendments to the Constitution, General Election, Nov. 7, 1950 (CR 58, Exh. 3; JA 271, 272).

[13] According to the supporting ballot argument:

> "The enabling act . . . permits bingo games for charitable purposes where it is authorized by a local ordinance and conducted by nonprofit charitable organizations. All proceeds must be used for charitable purposes. *The statute . . . was written to preclude participation by the underworld.* The charitable organization running the game must be recognized as a charity and exempt from taxation by both State and federal government. The games must be conducted by members of the organization and no individual connected with the games can receive a salary, wage or profit from the conduct of such bingo games." California Voters Pamphlet, June 8, 1976, Primary Election, at 40 (CR 58, Exh. 5; JA 275) (emphasis added).

An Assembly Interim Committee commented on the proposed constitutional amendment in a similar vein:

> "The problem that California has faced on this subject is that legalization of bingo would not only permit legitimate organizations to participate, but would also allow introduction of persons and groups whose purposes are not as worthwhile. Unless *adequate standards* were established, the repeal of Article IV, Section 26 of the Constitution as it relates to bingo could lead to encouragement of *professional gambling*. For this reason there appears universal support for the position that if bingo were legalized only members of an organization in good standing would be allowed to operate the game for the organization in question." Report of the Assembly Interim Committee on Constitutional Amendments to the California Legislature, Part I, Assembly Interim Comm. Reps., 1961-63, v. 27, no. 2, at 13 (CR 58, Exh. 6; JA 280) (emphasis added).

After the constitutional amendment was adopted, the California Legislature enacted section 326.5 of the Penal Code, authorizing cities and counties to adopt ordinances permitting bingo games "only for charitable purposes." The provision contains numerous safeguards to protect against organized criminal infiltration. The games can be conducted only by charitable organizations; the games must be operated only by members of the charitable organization itself; profits must be kept in special fund accounts, and cannot be commingled with other funds; and jackpots cannot exceed $250.[14] The tribal bingo games violate all these provisions. The games are not conducted by charitable organizations; the games are not operated by members of the organization; profits are not kept in special fund accounts; and the tribal jackpots greatly exceed $250. Indeed, the tribal jackpots include cars, boats, pickups, and cash awards of thousands of dollars. See note 2, *supra*.[15]

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[14] More particularly, violations are punishable by fines not to exceed $10,000, which shall be paid to the general fund of the city or county. Cal. Pen. Code § 326.5(c). Minors are not allowed to participate in the games. *Id.* at (e). An organization conducting bingo games shall use only property owned by or leased to it, or which has been donated to it. *Id.* at (f). The bingo games must be open to the public, not just to members of the organization. *Id.* at (g). The games shall be operated and staffed only by members of the organization, and such members shall not receive any profit, wage or salary from the games. *Id.* at (h). Only the charitable organization itself may operate the games, or participate in their promotion or supervision. *Id.* No other organization may have a financial interest in the games. *Id.* at (i). All profits must be kept in special fund accounts, and cannot be commingled with other moneys. *Id.* at (j), (k). A portion of the profits, however, may be used for prizes, to pay overhead or rent, and to pay license fees. *Id.* at (k). If the profits exceed a specified level, the city or county may require a portion of the profits to be used for charitable purposes unrelated to the bingo games. *Id.* at (k) (4). A license fee, not to exceed $50, may be imposed by a city or county. *Id.* at (l). No person may participate in the bingo games unless he is physically present. *Id.* at (m). The total value of the prizes shall not exceed $250 for each game. *Id.* at (n).

[15] California authorizes two other forms of lotteries—horse-race betting and the State Lottery—but both are subject to strict statewide standards to prevent organized criminal infiltration. The horse-racing act provides for licensing of horse-racing operators; establishes fee sched-

The tribal bingo games create substantial risks of organized criminal infiltration that do not arise with respect to State-regulated charitable bingo. The tribal games feature high stakes that generate huge profits attractive to organized crime. The federal government does not regulate, monitor, or supervise the games, and no federal standards apply to the games. Indeed, the games are not even subject to uniform intertribal standards. Instead, each tribe adopts and administers its own standards, assuming that such standards are adopted at all. Moreover, the Secretary of the Interior does not always approve the tribal standards; he has not, for instance, approved the Cabazon games involved here. Cab. Stip. 5 (JA 64).

Additionally, the Indian tribes of California and elsewhere generally lack the law enforcement capability to ensure that the games are honestly run. The Cabazon Tribe here, for example, which has only 25 members, cannot undertake the screening and auditing procedures necessary to guard against criminal infiltration. See note 16, *infra*. Nor can the Tribe adequately handle the law enforcement problems arising when hundreds of non-Indians enter the reservation to play the games. *Id.* Indeed, Indian tribes lack criminal jurisdiction over non-Indian players. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). In short, tribal bingo creates serious risks of organized criminal infiltration

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ules; provides for disposition of revenues; limits racing to certain days; creates a State agency to administer the standards; and provides for local law enforcement of the standards. Cal. Bus. & Prof. Code §§ 19400-19667. The State Lottery, recently adopted by State initiative, establishes rules governing participation in the lottery, disposition of revenues, and selection of the lottery director and lottery retailers; establishes a lottery commission to oversee the lottery, whose members are appointed by the Governor and State Senate; and provides for enforcement of the standards by State and local law enforcement agencies. Cal. Govt. Code §§ 8880 *et seq.* The extensive regulation of both lotteries ensures that neither will be controlled by organized crime.

because the games feature high stakes and are not regulated, risks that do not arise concerning charitable bingo.[16]

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[16] The risk of organized criminal infiltration posed by tribal bingo games has been described more fully by a representative of the U.S. Department of Justice as follows:

> "The Department of Interior has estimated that nearly 80 tribes are conducting gambling operations, chiefly bingo, and that 20 to 25 of these are 'high stakes' operations, *some grossing up to $1 million monthly*. . . .
>
> "The sudden growth of these operations has generated concern in the law enforcement community. . . . The basis of the concern is the attraction that all lucrative gambling operations will have for organized criminal elements. The large amounts of cash act as a magnet and a source of potential corruption. . . .
>
> "The attraction that high stakes gambling has for criminal elements should be readily apparent. . . . It involves a large number of fast moving cash transaction. The opportunities for "skimming" and "laundering" are enormous. Employees and managers can be corrupted into dishonest manipulations. Large-scale gambling operations require significant support services, such as security, food, cleaning, sanitation and transportation. Every one of these fringe operations can be lucrative and can attract racketeers who preserve their competitive edge by violence and intimidation. This has been the experience of legal gambling elsewhere. It has necessitated the creation of boards and commissions with pervasive supervisory authority, and even that has not always proved effective. . . .
>
> * * *
>
> "Although the tribes are recognized as governments, they do not have the authority or resources to police these types of activities. *The 25-member Cabazon Band . . . cannot adequately deal with the influx of hundreds of players.* Even larger tribes that could be said to be analogous to counties, do not have access to subpoena power or state criminal records that are just two of the many prerequisites to effective screening and auditing of a gambling operation . . . .
>
> "The Interior Department is in no position to assume the needed regulatory role, which in many respects, would be inconsistent with its mission and function." See "Gambling on Indian Reservations and Lands," Hearing before the Select Committee on Indian Affairs, U.S. Senate, on S. 902, 99th Cong., 1st Sess. 143, 144 (1983) (testimony of Deputy Assistant Attorney General Mark M.

**2. Organized Crime Studies**

The Commission on the Review of the National Policy Toward Gambling ("National Gambling Review Commission," or "Commission"), established by Congress to study gambling in the United States, § 804, 84 Stat. 930 (1970), has declared that bingo is a highly regressive form of gambling that may potentially fall under the control of organized crime. The Commission has recommended that bingo, if legalized at all, should be subject to uniform standards adopted and enforced by the states. According to the Commission's final report:

> "Contrary to popular belief, bingo cannot be categorized as a parochial, low-stake game played by middle-aged and elderly women. *It is, rather, a billion-dollar industry* (much of it illegal) whose popularity permeates all aspects of American society, and the abuses of which often go undetected or unremedied." "Gambling In America," Report by National Gambling Review Commission (hereinafter "Nat. Gambling Review Comm'n Rep.") at 160 (CR 58, Exh. 7; JA 123-124) (emphasis added).

The report further states:

> "Bingo is one of the more regressive forms of gambling—that is, those in the lower income groups spend proportionately more of their income playing it than those in higher income categories." *Id.* at 163 (JA 130).

In describing the relationship of organized crime to bingo, the report states:

> "Despite bingo's popularity as a charity fundraiser and its reputation as a harmless pastime, it has been the object of abuse by a number of sources: Illegal parlors resort to tricks to circumvent the law or openly defy it. Racketeers are thought to control bingo games—legal and illegal—in a number of urban areas. Skimming and other scams are practiced by both organized groups and shady independent operators. . . .

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Richard (CR 95, Exh. 21; JA 197, 198, 198-199, 201, 202) (emphasis added).

* * *

> *"Bingo takes in nearly $2 billion a year.* Laws regulating bingo games may be unenforced or ambiguous and it is easy to rake off substantial unreported amount of money taken in at the games. *Thus, it is apparent that national or local organized criminal groups would be interested in bingo as a source of illicit income." Id.* at 164 (JA 132, 133) (emphasis added).

The report concludes:

> "Because of bingo's pervasiveness and the income that it generates, *the Commission recommends that those States allowing bingo adopt and actively implement regulations to insure that the games are honestly run. . . ."*

* * *

> *"The office of the State Attorney General should be responsible for enforcing the regulations. . . ." Id.* at 166 (JA 138, 139) (emphasis added).

In 1967, the California Attorney General's Task Force on Legalized Gambling and Organized Crime also conducted a study of the relationship between gambling and organized crime. The Task Force concluded that states authorizing bingo had prevented organized criminal infiltration only by adopting and enforcing uniform, statewide regulatory standards. According to the Task Force's report:

> "In New York, bingo was legalized in 1958. With the advent of legalized bingo, racket minded promoters inevitably infiltrated vulnerable organizations and received the lion's share of the profits. The respectable name of the charity was used as a front and provided a buffer against legal prosecution. . . .

* * *

> "[T]he legalized game of bingo [in New York] was rifled with abuses, corruption, and violations of law. Another vice was the misappropriation of inestimable sums that were intended to support religious, charitable, and civic causes. . . .

* * *

> "Aside from a short period after the program's inception [in New York], stringent regulations and effective control have finally resulted in a successful endeavor which is devoid of the hoodlum element. . . ." Report by Attorney General Task Force, July 1, 1971, at 30-32 (CR 58, Exh. 8; JA 142-144).

The Task Force concluded that bingo, if legalized in California, should be played under "certain minimum standards" adopted by the State, that the standards should set "uniform state policy" regarding organizations qualified to conduct the games, and that the standards should provide for "licensing" of such organizations by local law enforcement officials. *Id.* at 33-34 (JA 144-145).

California thus has vital interests at stake here. California policy prohibits high stakes, unregulated gambling both on moral grounds and because such gambling creates a risk of organized criminal infilitration. The tribal games, which feature high stakes and are not regulated, create the very risk of criminal infiltration against which California policy guards. California's interests are frustrated if Indian tribes can establish zones of immunity where non-Indians can play high stakes bingo in defiance of State law. Under that result, California would become dotted with islands of Indian commercial gambling activity, thriving because of the "market" that California policy itself has created. The people of California, through their common law and constitutional policy, have chosen not to adopt Las Vegas-style gambling as a way of life. The people should have the right, through their elected representatives, to determine the kind of society in which they live. Thus, California's interests are significant here. Under the *Rice* balancing test, California's interests outweigh any competing tribal economic interests.[17]

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[17] The Ninth Circuit held that the State interest is "weak" because there is "no evidence" of organized criminal involvement in this case. JS App. 8. California's interest, however, lies in preventing organized criminal infiltration before it becomes an established fact, not simply correcting the problem after it occurs. It is harder to oust organized crime from an established operation than to prevent its establishment in

**D. The Federal Interest**

Under the common law balancing test, the federal interest is highly relevant in determining the applicability of state laws on Indian reservations. *Rice*, 463 U.S. at 725-735. In *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. 136, this Court, rejecting Arizona's attempt to tax non-Indian logging operations on Indian reservations, reasoned that Congress has adopted a "comprehensive" scheme regulating timber harvesting on Indian reservations; that the Secretary of the Interior has adopted extensive regulations governing timber harvesting; and that the U. S. Bureau of Indian Affairs (BIA) closely supervises such harvesting on a day-to-day basis. 448 U.S. at 145-148. "There is no room," the Court stated, "for these [State] taxes in the comprehensive federal regulatory scheme." *Id.* at 148. The State tax, it was stated, "would threaten the overriding federal objective" of the congressional scheme. *Id.* at 149. See also *New Mexico v. Mescalero Apache Tribe, supra*, 462 U.S. 324 (comprehensive federal and tribal regulatory fishing program preempts State laws as applied to non-Indian fishermen on Indian reservation); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982) (comprehensive federal regulation of Indian schools preempts State taxes as applied to construction of such schools).

By contrast, Congress has not authorized, directly or impliedly, Indian tribes to conduct commercial gambling operations that violate state laws. Further, the Secretary of the Interior and his representatives do not regulate, monitor, or supervise such operations. Indeed, the BIA has adopted regulations prohibiting gam-

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the first place. As a practical matter, a state often cannot detect organized crime unless it screens operators, audits books, and exerts the full force of its law enforcement apparatus. The Ninth Circuit decision prohibits all such forms of state action.

The State and County stipulated only that they "do not allege" the existence of organized crime here, not that organized crime does not exist. The State and County made this stipulation to ensure that the ultimate decision would not turn on specific facts that would limit the precedential value of the ultimate decision, particularly because, under our view, the existence of organized crime is not relevant to the jurisdictional question anyway.

bling "in any way whatever" on the premises of licensed Indian trader stores. 25 C.F.R. §§ 140.19, 140.21; see *Rice*, 463 U.S. at 736 (Blackmun, J., dissenting). This BIA prohibition may actually prohibit non-Indian operators from conducting the bingo games here. In any event, no federal regulatory scheme, "comprehensive" or otherwise, applies here. This case is bereft of the federal involvement and concern that has posed an obstacle to state jurisdiction over Indian reservations in other cases, such as *White Mountain*, *Mescalero*, and *Ramah*.

Indeed, as we explain more fully later, the Organized Crime Control Act (OCCA), 84 Stat. 937 (1970), 18 U.S.C. § 1955, prohibits gambling operations that violate state law. JS App. 25-26; see pages 41-42, *infra*. Thus, Congress, rather than preempting state gambling laws as applied on Indian reservations, has affirmatively authorized their application. The OCCA expresses federal gambling policy as clearly as 18 U.S.C. § 1161—which authorizes state regulation of liquor sales—expresses federal liquor policy. In *Rice*, this Court held that the latter provision supports the application of state liquor laws on Indian reservations. 463 U.S. at 725-735. Under the OCCA, the same conclusion follows respecting state gambling laws.

The Ninth Circuit held that modern federal Indian policy favors tribal self-sufficiency and economic development, and that this federal policy supports the tribal bingo games. JS App. 8.[18] Nothing in the federal policy favoring tribal economic development, however, suggests that this laudable goal should be achieved by non-traditional gambling operations that market exemptions from state law. In *Rice*, this Court held that "in the field of liquor regulation, we find no 'congressional enactments

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[18] The Ninth Circuit relied on a presidential policy statement and a declaration by an acting BIA official to support its conclusion that federal policy favors tribal economic development and thus supports the tribal interest here. JS App. 8. The presidential statement, however, does not suggest that the goal of economic development is to be achieved by gambling operations that violate state law. The statement by the acting BIA official cannot be considered an authoritative expression of federal policy, particularly in light of the absence of a federal regulatory scheme.

demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development,' " and that in this field "Indians cannot be said to 'possess the usual accouterments of tribal self-government.' " 463 U.S. at 724, quoting from *White Mountain Apache Tribe*, 448 U.S. at 143, and *McClanahan*, 411 U.S. at 167-168. Similarly, Congress has never expressed a policy favoring tribal economic development in the field of commercial gambling.

**E. Card Games**

Riverside County Ordinance No. 331 prohibits commercial card parlor games in all areas within the County's jurisdiction. Cab. Stip. 4-5, 7 (JA 62-63). Although California law does not directly prohibit the card games, see Cal. Pen. Code § 330, California law authorizes local governments to adopt more stringent gambling restrictions than those provided in State law. See *Remmer v. Municipal Court*, 90 Cal.App.2d 854, 856-857 (1949); *In re Farrant*, 181 Cal.App.2d 231 (1960). The Cabazon Tribe conducts three commercial card parlor games on its reservation: draw poker, lowball draw poker, and panguingue. Cab. Stip. 4-5, 7 (JA 62-63). The Cabazon card games violate the Riverside County ordinance.

The common law balancing test supports the County's right to prohibit the card games on the Cabazon reservation. The State interest is affected *not* by whether State law directly prohibits the gambling activity, but rather by whether the activity is regulated and controlled by State or local law enforcement authorities. The absence of State and local control, as noted earlier, creates a risk of organized criminal infiltration, and this risk occurs whether or not State law directly prohibits the particular activity. Thus, the Cabazon card games create a risk of criminal involvement that is contrary to California policy.

Moreover, the Cabazon Tribe is attempting to "market an exemption" from the County card parlor ordinance in the same sense that it is attempting to market an exemption from State bingo laws. Finally, the Tribe has not "traditionally" conducted card parlor games that solicit and depend on non-Indian patronage. See note 10, *supra*. For these reasons, the balancing test

supports the County's right to apply its ordinance to the card games.

## II

## PUBLIC LAW 280 AUTHORIZES THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS

Although Congress has not generally spoken concerning whether state laws apply on Indian reservations, Congress has enacted a statute, Public Law 280, authorizing California and certain other states to exercise limited civil and criminal jurisdiction over Indian reservations. See 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360; JS App. 23-25. Generally, when Congress "comprehensively" regulates a subject matter, it "preempts" or displaces any federal common law that might otherwise apply. See, *e.g., Milwaukee v. Illinois, supra,* 451 U.S. at 313-314 (Congress has occupied field of water pollution control and thereby displaced federal common law remedies). Public Law 280, however, does not preempt or displace California's common law jurisdiction over Indian reservations, as such jurisdiction is defined by the common law balancing test applied in *Rice.* Public Law 280 was intended to broaden California's jurisdiction over Indian reservations, but not to deprive California of jurisdiction retained by non-Public Law 280 states. Therefore, as the Ninth Circuit properly held, Public Law 280 delegates certain authority to California, but does not preempt common law authority that might otherwise exist. JS App. 6-7, & n. 6. If the result were otherwise, California would have less jurisdiction over Indian reservations than non-Public Law 280 states, where such jurisdiction is supported by the common law but has not been specifically addressed in Public Law 280 itself. This result would conflict with the purpose of Public Law 280 to broaden California's jurisdiction over Indian reservations.[19]

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[19] This result would also conflict with *Rice* itself. In *Rice,* this Court applied the common law balancing test in holding that California—a Public Law 280 state—has the right to regulate liquor sales on Indian reservations. If Public Law 280 preempts California's common law

Since Public Law 280 does not preempt California's authority under the federal common law, this Court need not determine whether California has requisite authority under Public Law 280 if it concludes that California has such authority under the common law balancing test. The Court need determine the effect of Public Law 280 only if it determines that California's authority is deficient under the balancing test. Importantly, the common law and statutory aspects of the case must be analyzed separately. Assuming *arguendo* that California's authority is deficient either under the common law or the statute, it does not follow that its authority is deficient under the other.

### A. Bryan's "Civil Regulatory-Criminal Prohibitory" Distinction

Public Law 280, which applies to California and certain other states, provides that "the *criminal* laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State," 18 U.S.C. § 1162(a), and that "those *civil* laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere in the State." 28 U.S.C. § 1360(a); JS App. 23, 24 (emphasis added).[20] In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court held

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authority, *Rice* would have erred in applying the balancing test. *Rice* can be sustained only on the premise that Public Law 280 does not preempt California's common law authority.

[20] The Assimilative Crimes Act (ACA), 18 U.S.C. § 13, which makes state laws applicable on federal lands, is made applicable to Indian reservations under 18 U.S.C. §§ 1152 and 1153. See *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Sosseur*, 181 F.2d 873, 874 (7th Cir. 1950); *United States v. Marcyes*, 557 F.2d 1361, 1365 n. 1 (9th Cir. 1977). Public Law 280, however, expressly provides that 18 U.S.C. §§ 1152 and 1153 "shall not be applicable" in Indian country located within Public Law 280 states. 18 U.S.C. § 1162(c); JS App. 25. The apparent purpose of the exception is to ensure that Public Law 280 states have direct jurisdiction over Indian reservations, not simply to assimilate state laws into federal laws as applied on such reservations.

Federal law specifically prohibits the possession or use of "any gambling device" in Indian country. 15 U.S.C. § 1175. This provision is

that Public Law 280 does not authorize Minnesota, a Public Law 280 state, to apply its property tax laws on Indian reservations. In dictum, the Court stated that Public Law 280 includes state "criminal" laws but not state "civil regulatory" laws. *Bryan*, 426 U.S. at 390. The "civil regulatory-criminal prohibitory" distinction was dictum because the property tax laws involved in *Bryan* were not regulatory; they raised revenue but did not regulate conduct. Indeed, *Bryan* focused primarily on legislative history showing that Congress did not mean to authorize state "tax" laws to be applied on Indian reservations,[21] indicating that its focus was not on state regulatory laws.

In *Rice*, this Court cast doubts on *Bryan's* "civil regulatory-criminal prohibitory" distinction. The Court held that California, a Public Law 280 state, can *regulate* liquor sales by Indian sellers on Indian reservations. The Court cited *Bryan* only for the view that state "tax" laws are not included under Public Law 280, 463 U.S. at 734 n. 18, thus implying that state regulatory laws may be included. The Court expressed general disapproval of distinctions between state "substantive" and "regulatory" laws, *id.*, thus impliedly disapproving *Bryan's* distinction between regulatory and non-regulatory laws.

Indeed, after *Rice*, *Bryan* creates an anomaly concerning state regulatory jurisdiction over Indian reservations. In *Rice*, this Court held that states can apply their regulatory laws on Indian reservations, assuming that the balancing test supports this result. In *Bryan*, on the other hand, the Court stated in dictum that Public Law 280 does not authorize state regulatory laws to be applied on Indian reservations under any circumstances. The anomaly arises because Public Law 280 was intended to *broaden*

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apparently inapplicable here because bingo does not involve the use of a gambling "device."

[21] The Court noted the "total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to *tax* Indians or Indian property on reservations," 426 U.S. at 381 (emphasis added), and noted that the House hearings on Public Law 280 "strongly suggest that Congress did not mean to grant *tax* authority to the State." *Id.* (emphasis added).

state jurisdiction over Indian reservations, but *Bryan* interpreted the statute as conferring *less* jurisdiction than states already have under the common law balancing test applied in *Rice*. In other words, a federal statute intended to broaden state jurisdiction actually confers less jurisdiction than already exists under the common law.

This Court should resolve the anomaly by making clear that *Bryan* applies only to state tax laws, and by rejecting the *Bryan* dictum that state regulatory laws are not included under Public Law 280. The common law balancing test applied in *Rice* allows for full and fair consideration of both state and tribal interests; the *Bryan* dictum, which absolutely prohibits the application of state regulatory laws, does not. If tribal interests are sufficiently worthy to prevail over state interests, or if state interests are relatively insignificant, the balancing test will adequately protect tribal interests and the *Bryan* distinction is unnecessary for that purpose. If, on the other hand, state regulatory interests are substantial and tribal interests marginal, the balancing test allows for proper accommodation of these interests and the *Bryan* dictum does not. Thus, the balancing test, not the *Bryan* distinction, provides for the "accommodation" of competing interests that underlies modern federal Indian law. See *Rice*, 463 U.S. at 719, quoting from *Colville*, 447 U.S. at 156.

This conclusion is supported by the specific language of Public Law 280 itself. Subdivision (b) thereof provides:

> "Nothing in this section . . . shall authorize *regulation* of the use of such [tribal] property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; . . ." 18 U.S.C. § 1162(b), 28 U.S.C. § 1360(b) (emphasis added).

Thus, Public Law 280 prohibits state regulatory laws on Indian reservations only where inconsistent with specific federal laws—treaties, agreements, statutes, or regulations—and not, as stated in *Bryan*, in all cases. This result is consistent with the balancing test applied in *Rice*, which holds that state laws are inapplicable if preempted by federal laws. *Rice*, 463 U.S. at 725. *Bryan* did not consider the effect of subdivision (b) because

*Bryan* did not involve state regulatory laws. The Ninth Circuit here held that California's gambling laws are not inconsistent with or preempted by any federal laws, JS App. 7, which indicates that California laws are not inconsistent with any federal "treaty, agreement, . . . statute, or . . . regulation" within the meaning of subdivision (b). Therefore, Public Law 280 directly authorizes the application of California's laws here.[22]

This conclusion is also supported by the legislative history of Public Law 280. On June 29, 1953, shortly before Public Law 280 was enacted, the U.S. Department of the Interior transmitted a report to the House Committee on Interior and Insular Affairs regarding H.R. 1063, the bill that became Public Law 280. Report from U.S. Dept. of Interior (CR 58, Exh. 14; JA 146). The Interior report recommended that H.R. 1063 be amended to provide that state "civil laws . . . of general application" are applicable on Indian reservations, and explained the reasons for the proposed change as follows:

> "The revisions incorporated in the enclosed draft would clarify the intent of the civil jurisdiction provisions in several particulars. They would make it clear that the effect of the bill would be, *not merely to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but also to extend to those reservations the substantive civil laws of the State insofar as those laws are of general application to private persons or private property.* The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians insofar as these customs

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[22] In a pre-*Bryan* decision, a federal district court in California held that, under Public Law 280, a county ordinance prohibiting commercial card games applied to tribal card games conducted on an Indian reservation. See *Rincon Band v. San Diego County*, 324 F.Supp. 371 (S.D. Cal. 1971), *rev'd on other grounds*, 495 U.S. 1 (9th Cir. 1974). The district court specifically held that the county ordinance was not inconsistent with a federal "treaty, agreement, . . . statute, or . . . regulation" within the meaning of Public Law 280. 324 F.Supp. at 377-378.

> or ordinances are not inconsistent with the applicable State laws." *Id.* at 2-3 (JA 149) (emphasis added).

The Interior report's proposed change was included in the bill finally approved by Congress. Therefore, Public Law 280 was meant "not merely to permit the State courts to adjudicate civil controversies" arising on Indian reservations, but also to provide for the application of state "substantive civil laws" on reservations. Read in conjunction with the provision in subdivision (b) excepting state laws that "regulat[e] . . . the use of" Indian property only under defined circumstances not applicable here, the Interior report makes clear that Congress contemplated no distinction between state "regulatory" and "prohibitory" laws. The Interior report was not mentioned in *Bryan*.

Indeed, it is often difficult to determine whether state criminal laws are "regulatory" or "prohibitory" because many criminal laws contain both regulatory and prohibitory aspects. Professor Cohen, commenting on the distinction, has stated:

> "[A] distinction between the two is often difficult to draw. For example, is a hunting law 'prohibiting' the taking of more than the bag limit of an animal regulatory or prohibitory." F. Cohen, *Handbook of Federal Indian Law*, at 295 n. 110 (1982 ed.).

Similarly, are state traffic laws that prohibit drivers from exceeding certain speed limits regulatory or prohibitory? What classification applies to state liquor laws prohibiting minors from consuming alcoholic beverages? The classifications are difficult because such state laws regulate social conduct by selectively prohibiting certain kinds of conduct. They require conformance with certain social standards by prohibiting and penalizing nonconformance. Thus, in a sense, virtually all prohibitory laws are "regulatory," for they achieve social goals by prohibitory means. To classify them as one way or the other involves an often arbitrary exercise that loses sight of the objective of the criminal scheme itself.

## B. Application of the Bryan Distinction

Alternatively, if Bryan's "civil regulatory-criminal prohibitory" distinction is valid, California's gambling laws are essentially "prohibitory" rather than "regulatory" and thus are included under Public Law 280. California law prohibits all forms of lotteries except where specifically authorized by law. Cal. Pen. Code § 320. Thus, California law prohibits bingo, although an exception is provided for charitable bingo. *Id.* at § 326.5. The purpose of California's general lottery ban is to prevent organized crime from establishing or gaining control of gambling operations in California. See pages 22-26, *supra*. The exception for charitable bingo is based on the legislative judgment that charitable bingo, if subject to adequate regulatory safeguards, does not pose the risk of organized criminal infiltration associated with the kind of high stakes, unregulated bingo involved here. Therefore, California absolutely prohibits a specific form of conduct—high stakes, non-charitable bingo—rather than licenses or regulates it. Additionally, criminal sanctions are imposed for violations of California's gambling laws. Cal. Pen. Code §§ 320-324, 326, 330. For these reasons, California's gambling laws are prohibitory within the meaning of *Bryan*.

The Ninth Circuit ruled otherwise, following earlier decisions of the Fifth Circuit and Ninth Circuit. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). According to the Ninth Circuit, California bingo laws are "civil regulatory" because the proscribed conduct does not violate California "public policy," in that California authorizes bingo for charitable purposes. JS App. 4.[23]

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[23] It is doubtful that the Ninth Circuit's "public policy" test properly differentiates between state "civil regulatory" and "criminal prohibitory" laws, even assuming the validity of the distinction. The test is illusory because all state laws—whether "regulatory" or "prohibitory"—are based on state "public policy," and their violation impairs state interests to some degree. The test allows federal courts to substitute their judgment of state "public policy" for the state legislative judgment, a

The Ninth Circuit apparently assumed that a state law is "civil regulatory," and that state "public policy" is not violated, if the state provides an exception from a general prohibition against criminal conduct. The assumption is a mechanical one because it focuses on the form of the state criminal scheme rather than its purpose and effect. The purpose of the California legislative scheme is to prohibit high stakes, unregulated gambling that will attract organized crime; an exception is provided for low stakes, regulated charitable bingo because it poses no risk of criminal involvement. See pages 22-26, *supra*. Thus, the "public policy" inquiry, assuming its relevance, turns on whether the State regulates and controls the activity—because such regulation and control relate directly to the organized crime risk—and not on whether the State provides an exception that creates no organized crime risk. The distinction is not, as the Ninth Circuit held, between commercial and charitable bingo, but between regulated and unregulated bingo.

The Ninth Circuit's mechanical analysis compounds the difficulties, mentioned earlier, concerning the difficulty of distinguishing between state prohibitory and regulatory laws. Under the Ninth Circuit analysis, many classically prohibitory laws may be construed as "regulatory" because they provide exceptions. For instance, state statutes prohibiting intentional homicide provide exceptions for homicide committed in self defense; state statutes prohibiting narcotic use provide exceptions for medically-controlled narcotic use; and state statutes prohibiting fireworks provide exceptions for publicly-controlled fireworks displays.[24] Although such state prohibitions are clearly "prohibitory," the Ninth Circuit's mechanical analysis suggests the opposite conclusion. The Ninth Circuit analysis illustrates the difficulties arising

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result that Congress obviously did not contemplate. Indeed, *Bryan* itself did not suggest a "public policy" test. The test should be rejected, assuming that the *Bryan* distinction is otherwise retained.

[24] The Ninth Circuit held in an earlier case that state fireworks statutes are "criminal prohibitory" under the *Bryan* analysis, notwithstanding that exceptions are provided for publicly-controlled fireworks displays. See *United States v. Marcyes, supra*, 557 F.2d 1361. This decision is difficult to reconcile with the Ninth Circuit analysis here.

from the prohibitory-regulatory distinction and the general irrelevance of the distinction in measuring state and tribal interests. California's gambling laws are clearly "prohibitory," assuming the relevance of the classification, and are not rendered less so by an exception for charitable bingo that creates no organized crime risks.

## III

## THE ORGANIZED CRIME CONTROL ACT AUTHORIZES THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS

The Organized Crime Control Act (OCCA) prohibits gambling operations "in violation of the law of a State or political subdivision in which it is conducted." 84 Stat. 937 (1970), 18 U.S.C. § 1955; JS App. 25-26. Thus, the OCCA, by its terms, makes state gambling laws applicable on Indian reservations.[25] As noted earlier, the OCCA expresses a federal policy favoring the application of state gambling laws on Indian reservations, as federal policy is relevant under the common law balancing test applied in *Rice*. See page 31, *supra*. Additionally, the OCCA makes state gambling laws directly applicable on Indian reservations, apart from the balancing test. Thus, the OCCA is relevant concerning both the common law and statutory aspects of the case.

The Ninth Circuit held that the OCCA does not apply here because California's gambling laws are "civil regulatory" in that the tribal bingo games do not violate State "public policy." JS App. 6. In effect, the court extended *Bryan's* "civil regulatory-criminal prohibitory" distinction to the OCCA. Nothing in the OCCA or its legislative history, however, supports the distinction.

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[25] The OCCA applies only to large-scale gambling operations, for it is limited to (1) operations involving five or more persons, and (2) "substantially continuous" operations that last for more than thirty days or that have a gross revenue of more than $2000 in any day. 18 U.S.C. § 1955(b). The tribal bingo operations here meet these limitations and are thus large-scale operations for purposes of the OCCA.

The Ninth Circuit simply borrowed the distinction from *Bryan*—apparently as an unarticulated principle of federal common law—even though *Bryan* involved a different statute addressing a different subject matter. This Court in *Rice* rejected an analogous "substantive-regulatory" distinction in construing a federal liquor statute—18 U.S.C. § 1611—stating that "in the absence of a context that might possibly require it, we are reluctant to make such a distinction." *Rice*, 463 U.S. at 734 n. 18. The Ninth Circuit displayed no such reluctance in extending the distinction to the OCCA. The distinction should be rejected because it is supported neither by the OCCA nor its legislative history. Additionally, the tribal bingo games are contrary to California "public policy," see pages 22-26, 40-41, *supra*, and thus the OCCA applies here in any event.[26]

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[26] The Sixth Circuit recently rejected the "civil regulatory-criminal prohibitory" distinction as applied to the OCCA. See *United States v. Dakota, et al.*, No. 85-1568 (6th Cir., filed July 18, 1986). The court specifically disagreed with the Ninth Circuit decision here relating to the OCCA issue. Slip Op. 7 n. 6. The Sixth Circuit decision, not the Ninth Circuit decision, comports with the congressional intent underlying the OCCA.

The State of Michigan joined with the United States in bringing the *Dakota* action in the federal district court, but was dismissed by the district court on grounds that states lack jurisdiction to prosecute OCCA violations. *Id.* at 2, & n. 1. Since Michigan did not appeal the dismissal order, *id.*, the Sixth Circuit did not decide the jurisdictional issue, although in dictum it appeared to agree with the district court analysis. *Id.* at 5.

In our view, states have jurisdiction to enforce the OCCA, or at least to make arrests for OCCA violations. Under the Supremacy Clause, U.S. Const., Art. VI, § 2, "the Constitution, laws and treaties of the United States are as much the part of the laws of each state as its own local laws and constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). Accordingly, state officers have general authority to apply and enforce federal laws except where federal law provides otherwise. See *Marsh v. United States*, 29 F.2d 172, 173-174 (2d Cir. 1928) (state officers have authority to make arrests for violations of federal prohibition laws); *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (state officers have authority to enforce federal immigration and naturalization laws); *People ex rel. Happell v. Sischo*, 23 Cal.2d 478,

## CONCLUSION

The paramount question here is whether the Tribes' interest in raising revenue outweighs the State's interest in regulating the conduct of its non-Indian citizens. The Tribes have no particular interest in the activity itself; their sole interest is in raising revenue. The State, on the other hand, has a distinct interest in regulating its non-Indian citizens; State policy prohibits the high stakes, unregulated games that attract non-Indian patrons here. State policy is based on the need to protect against organized criminal infiltration in California.

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491 (1943); 67 Ops. Cal. Atty. Gen. 331, 334 (1984). This line of authority supports California's right to directly enforce the OCCA.

Even if California has the right only to make arrests for OCCA violations but not to directly prosecute such violations, California's authority must be sustained here, for California's authority is challenged only insofar as California makes arrests. That is, California does not attempt to prosecute OCCA violations in this case. Rather, the Tribes' complaints seek declaratory and injunctive relief to restrain State and local officials from making arrests. JA 28, 34-35, 40, 44.

The State cannot effectively protect its interests if Indian tribes can provide gambling havens for non-Indians who seek refuge from state gambling laws. The tribal games flagrantly exploit State gambling policy, and are profitable only because they do so. The "accommodation" of state, federal, and tribal interests that underlies modern federal Indian law supports the application of State and local laws here. Therefore, this Court should reverse the lower decision.

Respectfully submitted,

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